

# Emotion Experiments in Legal Thought

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**Abstract:** This essay argues that the simulation of emotion, which also results in multiple shifts of moral perspective, can generate insight into matters of value, and thereby also assist in making potential justificatory resources in legal reasoning. The essay examines two practices that both, though in different ways, enable the simulation of emotion and the multiple shifting of moral perspective: first, the practice of inventing and exchanging *colores* in the ancient Roman pedagogical practice of declamations; and second, the practice of using hypothetical narratives in common law reasoning. In the case of the declamations, emotion is simulated, and moral perspective is shifted, by an intensively interactive process of inventing, critiquing and improving upon possible and alternative motivations and intentions of characters in the declamatory *themata*. Similarly, in common law reasoning, emotion is simulated, and moral perspective shifted, by the construction of hypothetical narratives, offering alternative or counter-hypothetical narratives, amplifying existing ones, and distinguishing hypothetical narratives from the facts of the instant case. Ultimately, the essay argues that one of the most effective ways of reasoning about matters of value is through the affectively-laden multiple shifting of moral perspective.

## I. Introduction

What is the value of simulating emotion in the process of legal reasoning? That is the question I hope to provide an initial answer to in this essay. I do so by examining two

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practices which, although separated by around two thousand years, have enough in common to provide clues as to the importance of simulating emotion in legal thought.

The first practice is that of the Ancient Roman declamatory exercises in schools of rhetoric. I will be drawing, in particular, on one kind of declamatory exercise—the *controversiae*—as described by Seneca the Elder in the first century CE. The *controversiae*, which were also the most advanced exercises for students of rhetoric in Ancient Rome, were fictional cases that required students to argue on one or another side of the case, and grapple with problems of the meaning and scope of laws as well as conflicts between legal principles. The simulation of emotion played a vital role in these exercises. Students performed in the persona of one of the characters in the fictional cases, and were expected to both feel and express what that character might have felt and expressed in the fictional scenario. So important was the role of simulated emotion in these exercises that we may well call them “emotion experiments,” i.e., narratively-based exercises in the simulation of emotions that a character (or characters) might have felt and that an audience ought to feel in relation to that character and their actions. Students would simulate emotions—on behalf of the character(s) and with a view to inducing appropriate emotional responses from the audience—by inventing the motives and intentions that made the character’s actions intelligible as well as ideally morally justifiable. The rhetorical term for these inventions was that of *colores*, i.e. insertions into the narrative that directly or indirectly gave color to the motives and intentions of the character, and thereby also colored (as we would still say today), and hopefully favorably, the audience’s judgment of the actions of that character.

For anyone interested in the role and value of emotion experiments, this already makes the declamatory exercises a fascinating source. However, the pedagogical process involved in these exercises went much further. For once the speeches on behalf of the characters in the fictional scenarios had been delivered, it was then time for the audience to

propose alternative *colores*, or to improve upon existing ones. This intensively interactive practice of inventing and exchanging variations of *colores* submerged the students in multiple shifts of moral perspective. With each different *color* proposed, students shifted from one moral evaluation of the character and their actions to another. This essay argues that in so doing—in this process of affectively-laden multiple shifts of moral perspective—the students were generating norms and values that might be relevant to grappling with the meaning and scope of, or conflict between, laws.

Having made the case for the declamations, the essay then proceeds to consider the role and value of hypothetical narratives in common law reasoning. Here, too, that role and value consists in the simulation of emotion, which results in shifts of moral perspective, and, in that process, generates potentially relevant justificatory resources (whether they be used in making the decision in the present case or, more commonly, by future audiences reading the judgment). As with the declamations, here the advocates and judges engage in an interactive process of constructing hypothetical narratives, offering counter-hypothetical narratives, proposing alterations or amplifications to already existing hypothetical narratives, and distinguishing hypothetical narratives from the facts of the instant case. This process of constructing and exchanging variations as well as distinguishing hypothetical narratives involves the simulation of emotion. As with the declamations, this means simulating both what one or both of the characters in the hypothetical narrative may have felt, as well as simulating what one ought to feel in relation to how they felt. The common law may have forgotten the rhetorical term of *color*, but something like it is being deployed in the construction and exchange of variations of hypothetical narratives.

A final preliminary observation can be made here about this term *color* in the practice of rhetoric. The term has a complex and fascinating history, sometimes meaning *loci*

*communes* or common-places (as in Sir Francis Bacon’s *The Colours of Good and Evil*);<sup>1</sup> sometimes meaning a tone or style of language (this is arguably how Cicero uses it),<sup>2</sup> or relatedly, the use of florid language (for instance, “purple prose”);<sup>3</sup> sometimes as the use of language that cloaks lies with truth;<sup>4</sup> and even, at a certain point in the late medieval common law, a term of pleading, which involved the invention of a fictional story in order to avoid a matter going before a jury.<sup>5</sup> The various adventures of the term *color*, then, would make for a lively literary and cultural history, and one which would involve the law in all kinds of fascinating and surprising ways. Such an adventure I leave for another day.

## II. The Roman Declamations

The declamatory tradition has a long and complex history—stretching arguably from the

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<sup>1</sup> Sir Francis Bacon, *The Colours of Good and Evil* (1597). As Lisa Jardine notes, the colors in Bacon are understood to be “popularly accepted judgments of relative worth.” Lisa Jardine, *Francis Bacon: Discovery and the Art of Discourse* 222 (1974).

<sup>2</sup> According to Frederick Bonner, writing about the Roman declamations, prior to Seneca the Elder, and thus as deployed by Cicero, *color* was “a general word for ‘cast’ or ‘tone’ or ‘style’; in Seneca, however, “it takes on the quite different meaning of ‘twist of argument,’ ‘plea,’ ‘excuse.’” Frederick Bonner, *Roman Declamation in the Late Republic and Early Empire* 55 (1949).

<sup>3</sup> See, e.g., Stephanie Lysyk, *Purple Prose: Writing, Rhetoric and Property in the Justinian Corpus*, 10 *Cardozo Stud. Law & Lit.* 33 (1998).

<sup>4</sup> As Quentin Skinner explains, Quintilian says “if you can manage to make your falsehoods cohere with something which is true” you thereby lend “colour” to your lies (Forensic Shakespeare (2014), 253). Skinner goes on to show how this is deployed by Iago in *Othello*. In his recent book, *From Humanism to Hobbes: Studies in Rhetoric and Politics* (2018), Skinner also discusses this practice of coloring (as cloaking lies with truth), showing its close link to the rhetorical figure of paradiastole. For example, this figure is described by Angel Day in 1592 as employed when “wee color others or our owne faultes” (see 101).

<sup>5</sup> See Donald W. Sutherland, *Legal Reasoning in the Fourteenth Century: The Invention of “Color” in Pleading*, in *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne* 182 (Morris S. Arnold et al. eds. 1981); James Landman, *Pleading, Pragmatism, and Permissible Hypocrisy: The “Colours” of Legal Discourse in Late Medieval England*, 4 *New Medieval Lit.* 139 (2001). Note also the discussion of color in this sense of a rule of pleading, and its relation to early modern theater, in Subha Mukherji, *Law and Representation in Early Modern Drama* (2006), ch. 4.

practices of the Greek sophists in fifth century BC,<sup>6</sup> through to the training exercises in schools of rhetoric in the Roman Republic and the Roman Empire, and beyond to, for instance, the exercises of students in schools and universities in Europe, including in Renaissance England.<sup>7</sup> My focus here will be on the Roman practice, as described by Seneca the Elder (54 BC-39 CE).<sup>8</sup> I shall first offer some historical background on declaiming in Ancient Rome and then go on to discuss some specific examples in the Senecan declamations.

As practiced in Ancient Rome (from the Republic to the Empire), the declamations were exercises for students, run by rhetors (teachers of rhetoric), as training in oratory and, possibly, advocacy in the courts.<sup>9</sup> There were two kinds of declamations: the *suasoriae* (speeches on behalf of some figure, typically a politician, in some set of circumstances, e.g., Cicero in his final hours) and the *controversiae*. The latter are what I am interested in here: these were short fictional cases (called *themata*, or *thema* in the singular) that began with one or more legal principles, which would then have to be applied and interpreted, or balanced as against each other, in the context of a particular fictional scenario.

The classroom dynamics are key to the pedagogical value of these exercises. The rhetor would first read the case and offer a very brief account of possible questions and issues

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<sup>6</sup> For the Greek practice, see D.A. Russell, *Greek Declamation* (1983). Russell famously invented the city of Sophistopolis (chapter 2), the fictional city of the fictional cases—which we might compare to the ‘legal village’ of fictional characters and invented scenarios in legal thought. See also *Law and Ethics in Greek and Roman Declamation* (Eugenio Amato et al. eds., 2015).

<sup>7</sup> See, e.g., the use of the declamatory form by Sir Thomas More in his reply to Lucian’s *Tyrannicide*: Sir Thomas More, *Yale Edition of the Complete Works of Sir Thomas More*, Volume 3, Part 1 (1974).

<sup>8</sup> There are also the declamations ascribed to Quintilian (the minor and major declamations). I choose Seneca, however, as the declamations arguably changed character considerably in the transition from Republic to Empire (already around when Quintilian was writing), becoming more flamboyant and theatrical, and attracting much derision and critique as a result.

<sup>9</sup> See Bonner, *supra* note 2; J.A. Crook, *Legal Advocacy in the Roman World* (1995); and Patrick Parks, *The Roman Rhetorical Schools as a Preparation for the Courts under the Early Empire* (1946); and *Reading Roman Declamation: The Declamations Ascribed to Quintilian* (Martin T. Dinter et al. eds., 2016).

that might arise. Students were then given the task of arguing on behalf of one or the other side of the case. Crucially, students would do so in the persona of a character in the *thema*. They were expected to speak in the voice of that character, and to deploy the gestures that these characters may have expressed.<sup>10</sup> These performances were highly emotionally charged—a point I shall return to. Students first composed their speeches in writing, and shared these drafts with the rhetor, who would offer some initial feedback. They would then commit the speech to memory, and perform it in front of the audience. The audience was by no means passive during the performance: they would sometimes applaud, and sometimes hiss. Following the performance, the audience would become even more actively engaged, proposing alternatives and improvements. It is noteworthy that the audience sometimes included adults who were former declaimers (indeed, there is evidence that adults continued to declaim together in later life—clearly there was something pleasurable to these exercises!).<sup>11</sup> Following the discussion by the audience, the rhetor would sometimes himself deliver his own speech on behalf of one of the sides.

The various features of the genre of the declamatory *themata*, as well as the intensively interactive process in the classroom, contributed to enabling the simulation of emotion, and ultimately also to the multiple shifts of moral perspective. Here, I shall make two points: first, to show how the implausibility, if not absurdity, of the facts, as well as the often fictional character of the laws, enabled the simulation of emotion; and second, to consider what it was that the students were inventing in the course of their speeches, and then improving upon or offering alternatives to in the course of the group discussion (namely, the

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<sup>10</sup> Indeed, this may have been part of the fun and pleasure of these exercises, for such performance-in-character clearly had comic potential. It is arguable, in fact, that the declamations have their origin in the comic sketches of the mimes in the great flowering of Greek sophistry in the sixth and fifth centuries BCE.

<sup>11</sup> See Jeremy Brightbill, *Roman Declamation Between Creativity and Constraints* (Ph.D. Thesis, University of Chicago, 2015): following Seneca, Brightbill says that “declamation continued to be practiced by adult elites, and performances were even held in the court of the Emperor Augustus.” Id. at 3.

*colores*). The combination of both of these points will show us how these exercises involved a process of affectively-laden multiple shifting of moral perspective, which in turn generated insights into norms and values that might be relevant in grappling with the meaning and scope of laws or conflicts between them.

First, then, let us turn to the genre of the fictional scenarios of the *controversiae*. Here are some examples:

*A priestess must be chaste and of chaste [parents], pure and of pure [parents].*

A virgin was captured by pirates and sold; she was bought by a pimp and made a prostitute. When men came to her, she asked for alms. When she failed to get alms from a soldier who came to her, he struggled with her and tried to use force; she killed him. She was accused, acquitted and sent back to her family. She seeks a priesthood (Sen. 1.2).<sup>12</sup>

*A girl who has been raped may choose either marriage to her ravisher without a dowry or his death.* On a single night a man raped two girls. One demands his death, the other marriage (Sen. 1.5).

A husband and wife took an oath that if anything should happen to either of them the other would die. The husband went off on a trip abroad, and sent a message to his wife to say that he had died. The wife threw herself off a cliff. Revived, she is told by her father to leave her husband. She does not want to, and is disinherited (Sen. 2.2).

A wife, tortured by a tyrant to find out if she knew anything about her husband's plot to kill him, persisted in saying she did not. Later her husband killed the tyrant. He divorced her on the grounds of her barrenness when she bore no child

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<sup>12</sup> All references to, and translations of, the Senecan declamations are to the Winterbottom edition: *The Elder Seneca Declamations: Controversiae*, Vol 1 (Michael Winterbottom trans. & ed., 1974).

within five years of marriage. She sues him for ingratitude (Sen. 2.5).

*A man with a beautiful wife went off abroad.* A foreign trader moved into the woman's neighbourhood. He three times made her propositions of a sexual nature, offering sums of money. She said no. The trader died, leaving her all his wealth in his will, to which he added the clause: 'I found her chaste'. She took the bequest. The husband returned and accuses her of adultery on suspicion (Sen. 2.7).

*The penalty for malicious damage is to pay four times the amount of the loss, for unintentional damage only the amount of the loss.* A rich man asked his poor neighbour to sell him a tree which he said blocked his view. The poor man refused. The rich man burned down the plane-tree, and the house went up in flames at the same time. For the tree he is ready to pay four times the amount, for the house only the amount (Sen. 5.5).

In all these cases, the laws to be applied and interpreted are either cited at the beginning (in italics) or implied (e.g., suing for ingratitude or adultery). Although it is a matter of controversy in the literature, it appears now generally to be agreed that the laws are largely fictional, harking back for instance to a long-past Greek world (unsurprisingly, given, as above, the origins of the declamations in Ancient Greek sophistic practices).<sup>13</sup> From the perspective of this essay, the fictionality of the laws is not, as the saying goes, a bug but a feature. It is, in part, thanks to the fictionality of the laws that the students are enabled and encouraged to engage in rhetorical invention and ultimately also the simulation of emotion. As Martin Bloomer put it, "had they been real Roman laws, the discourse about them would have been severely limited, and part of the point of declamation was to get teenaged boys to speak freely."<sup>14</sup>

More important, however, than the fictionality of the laws are the literary qualities of

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<sup>13</sup> For this debate in general, see the sources cited in footnote 9, above.

<sup>14</sup> W. Martin Bloomer, *Latinity and Literary Society at Rome* 137 (2015).



the fictional scenarios—the *themata* of the declamations. Note, first, the kinds of characters that feature prominently: pirates, prostitutes, priestesses, tyrants, rapists, foreign traders, and the poor man and the rich man. They are often from the lower classes or from the margins of society. In this respect, they once again echo the genre of Ancient comedy. Further, the events are highly implausible, and sometimes absurd. For instance, a woman throws herself off a cliff, only to be revived. A prostitute fights a soldier and kills him, only to then seek to be a priestess. The rich and the poor man do battle once again (in what feels like a comic sketch), with the rich man going so far as to burn down a tree that blocks his view. Some of the *themata* are less comical, and extreme in other respects: they represent the worst possible things that could happen to a family, especially to children. Fathers (also sometimes as brothers or husbands) are often (almost unimaginably) cruel. The Roman *paterfamilias* does not come off well in this genre (or does he, for that is part of what is being explored).

What, then, is the cognitive effect of such implausibility—and sometimes absurdity or extremity? My argument here is that the genre of these *themata* trigger the simulation of emotion. Notoriously, the declamatory *themata* were not emotionally neutral. Reading them, one is almost immediately overcome by some emotion, e.g., by indignation (say on behalf of the wife who is divorced after having been tortured by a tyrant and, as a result, not being able to have children). Further, in being as short as they are, and thus leaving a great deal open for conjecture (especially about the motivations and intentions of the characters), the *themata* not only lend themselves to, but basically require, the further simulation of emotion.

Importantly, for my purposes, that simulation of emotion comes in two forms. First, the declaimer would need to simulate how the characters in the relevant *thema* might have felt in the circumstances. In order to develop and perform a speech, either attacking one of the characters and their actions (say, the allegedly ungrateful husband) or defending one of the characters and their actions (say, the wife who was left all the wealth of the foreign trader,

who had made advances to her), a declaimer had to consider what someone in those circumstances might have felt. Indeed, declaimers were expected to not only simulate those emotions, but to actually feel them in performing in the persona of that character. Thus, Quintilian says: “We play the part of an orphan, a shipwrecked man, or someone in jeopardy. What is the point of taking on these roles if we do not also assume the emotional?”<sup>15</sup> Second, the declaimer would have to simulate the emotions of the audience he was trying to persuade—his aim was, especially through the invention of *colores* (to which I shall come in a moment), to generate certain kinds of emotions in the audience, and, in so doing, to either strengthen their already-existing sympathy towards the character or to persuade them to switch their emotions in favor of that character. In order to do this, the declaimer would constantly have to project and anticipate how an audience might react to some phrase or insertion into the narrative he was developing in his speech.

The genre of these declamatory *themata*, then, may be characterized as one of “emotion experiments.” They do not merely invite us to imagine (to suppose, to make inferences) in the way that thought experiments do (also often employing some implausibility or absurdity)—they invite us to *imagine affectively*, i.e., they invite us to simulate emotion. As Joy Connolly has written, declamations basked in “emotional excesses . . . where anger, grief, pain, and love are expressed in extravagant terms on almost every page, when the physical effects of suffering are portrayed in close detail.”<sup>16</sup> Connolly adds further:

These texts draw us to concentrate on the moments where speakers dissolve into tears and cries of anguish, where they experience the somatic limits of experience. They ask us to ask ourselves where our sympathies lie, how far we are willing to let our

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<sup>15</sup> Quintilian, *Institutio Oratoria* (95 CE), 6.2.36.

<sup>16</sup> Joy Connolly, *Imaginative Fiction Beyond Social and Moral Norms*, in *Reading Roman Declamation*, *supra* note 9, at 191, 200.

sympathies go, and where they end.<sup>17</sup>

This is so much so, Connolly asserts, that we can understand the declamations as “experiments in suffering and its representation.”<sup>18</sup> I very much agree, hence the term chosen to characterize this genre and exercise as one of “emotion experiments.”

I promised, above, to consider another feature of the declamations, and one which, I argue, shows us more directly how the simulation of emotion in these exercises is connected to the multiple shifting of moral perspective and, ultimately, also to the generation of insights about what norms and values might be relevant in the application and interpretation of law. This feature is that of *colores*. To recall, as deployed by the declaimers, *colores* are forms of rhetorical invention: they are insertions into the narrative that either directly describe the motivation or intention of a character, or indirectly (for instance, through the insertion of some scene, involving some dialogue between the parties) invite the audience to infer that motivation and intention. The idea here is that by experiencing these invented *colores*, the declaimer and the audience are engaged in the simulation of emotion (of how that character, and other characters, might have felt in those circumstances) and, at once, in the taking of a moral perspective (either positively or negatively evaluating that character or those characters, and their actions). These *colores* were already introduced in the initial speeches given by the declaimers—and thus already then the audience had two contrasting sets of *colores*—but it is in the subsequent discussion by the audience that we see a particularly intensive interactive process of exchanging *colores*, and thus multiple shifting of moral perspective.

The dynamics of *colores* are best illustrated with an example. Here is the *thema* entitled “The Man Who Disinherited his Nephew”:

*Children must support their parents, or be imprisoned.* Two brothers were at

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<sup>17</sup> Id. at 208.

<sup>18</sup> Id. at 192.

loggerheads. One had a son. The uncle fell into need; though his father told him not to, the youth supported him: as a result, he was disinherited, without protest. He was adopted by his uncle. The uncle received a bequest and became rich. The father has fallen into need, and the youth is supporting him against his uncle's wishes. Now he is being disinherited (Sen. 1.1).

Though perhaps not as implausible as some of the other examples above, this *thema* is also clearly highly improbable. The facts are too neat, too symmetrical, and almost too predictable. A son is punished twice for being (we might say) generous to a fault. By a twist of fate (poetic justice?) the father who initially refuses to assist his brother who is in need, is now in need himself. Ought the son be allowed (or indeed required) to support his father (as per the law), or is the uncle right to disinherit him for going against his wishes? At stake here are various questions that pertain to the meaning and scope of this law. As described by Latro, these questions include:

Does a disinherited son cease to be a son? Does someone who, besides being disinherited, has been adopted by another, cease to be a son? Even if he was still a son, should everyone who has failed to support his father be punished? Suppose he were sick, in prison, a captive? Can the law accept an excuse on the part of a son? . . . On the question, Should he be disinherited . . . Even if that man did not deserve to be supported, was this man nevertheless right to support him? Next, Was he worthy of support? (Sen. 1.1.15).

All these are clearly relevant to the scope and meaning of the law that requires children to support their parents or be imprisoned, and especially as raised by these hypothetical facts. How did the declaimers both raise and explore these questions? How did they generate the possibly relevant norms and values that might assist in answering them—whether in this case or in similar cases in the future? My argument here is that they did so by inventing and

exchanging variations of *colores*.

The speeches on both sides already contain *colores* that seek to affect the audience's emotion and thereby also its moral perspective. Thus, for instance, on behalf of and in the persona of the son, it is claimed by Cestius Pius that "I wanted to bring back the brothers to friendship" (Sen. 1.5.7), which introduces a motive (for supporting each brother despite requests by the other brother not to) that is not to be found in *thema* itself (but is compatible with it). And on behalf of and in the persona of the uncle (the now rich one who is disinheriting the son he adopted), it is said by Vallius Syriacus that the father of the son "ordered me to be flung out, heaping insults on me. He raised his hands to heaven . . . [and] that was the first time he prayed his brother [i.e. the uncle] should live" (so that he would suffer longer) (Sen. 1.1.11). Here, the father (in his role as a brother) is being characterized as so cruel that it could not possibly be right for the now rich uncle to allow him to be supported by the son. Here, already, the declaimers, via their *colores*, were raising potentially relevant norms and values, e.g., does the quality of the relations between brothers (their "friendship") trump the quality of relations between children and their parents, or is it vice-versa? In determining the scope of a child's obligation to obey their father, how far, if at all, do the father's motivations matter (e.g. as here, where the father is seeking to make his brother suffer)?

Questions like this are multiplied in the subsequent *colores* offered in the discussion by the audience. For instance, on behalf of the son, it is suggested that he was moved by religion: "Nature moved me, piety moved me . . ." (Sen. 1.1.16), and entire scenes are invented (e.g. "My father came to me, and spoke to me in words that were not humble. He did not beg: he knew how one ought to behave towards a son—he gave me orders to feed him": Sen. 1.1.17) or "I was moved because he came asking nothing as of right, nothing as in his power—he came as though he were an uncle" (Sen. 1.1.18) or "There fell at my feet an

old man, beard and hair matted . . . I helped him up, not knowing who he was. Do you want me to reject him, just because he is my father?” (Sen. 1.1.19). In these examples, motivations and intentions are either directly introduced, or scenes are invented, which invite the audience to infer motivations and intentions. In all of them, too, the audience is invited to sympathize with the son, but for very different reasons: e.g., either because he was following orders of a father or had religious convictions, or because he was deeply (and admiringly) moved by pity. In that way, normative insights are generated: we can ask, on the back of these *colores*, which, if any, of these motivations and intentions matter to deciding how far an obligation to obey one’s father (or adopted father) ought to be stretched. For example, does a religious conviction take priority over a father’s wishes—especially where those father’s wishes (here, for instance, the adopted father’s) would put in danger someone’s life (here, one’s natural father)?

*Colores* are also discussed for the other side (the now rich uncle), which it is acknowledged “is more difficult” (Sen. 1.1.21). For example, Latro is reported to have said that “we should follow the colour of representing unremitting and passionate hatred, arising from the gravest injuries, Thyestes-wise . . . the father should not merely be angry: he should rave” (Sen 1.1.21). The moral evaluation of the act of one party (e.g., the son supporting his father, now in need) is (potentially) colored by the characterization of another—in this case, by amplifying the emotion of the father (not merely angry, but raving). In these *colores*, the “hatred” between the brothers is emphasized: “Judges, hear how badly I was in need. I had to beg my brother!” (Sen. 1.1.21). Indeed, the original neglect by the father of the uncle is characterized in some of these *colores* as “parricide,” and an allusion is made to the “savagery of Atreus, who served up to his brother Thyestes his own children.”<sup>19</sup> This allusion, in turn, and the use of the term “parricide” is criticized by Cestius, who says that he

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<sup>19</sup> See Winterbottom, *supra* note 12, at 54-55, n.1.

“did not like this savage colour, and said it should be toned down,” replacing it with a different one: speaking in the name of the uncle addressing the son directly, he says that “You ought to have asked me to give aid myself, you ought to have brought him to me, you ought to have sought to reconcile us, not tried to win a reputation for affection from our quarrel” (Sen. 1.1.24). Here, the son is characterized as an opportunist, trying to improve his own reputation for affection, and at the cost of reputation to the uncle who ought to have been consulted. Again, on the back of these *colores*, we can ask: ought the possibly murderous motivation and intention of the father be relevant to determining the scope of the child’s obligation to obey them? Ought the motivation and intention of a son—whether he is being an opportunist or not—be relevant to deciding whether he can or cannot be disinherited?

Speaking of Seneca’s *colores*, Frederick Bonner characterized them in the following way:

By a slight shift of argument, by an added insinuation, or a guileless plea, they tone down the guilt or represent it in even more glaring colours. The *colores* are the Persian carpet of the declaimer; look at from one angle and the colours are bright and clear, the pattern simple, but observe it from another angle, and the shade deepens, the pattern changes, and the whole appears in a different light.<sup>20</sup>

Persian carpet indeed, and one very much intertwined with the substance of the argument. It is thanks to this interactive exchange of variations of *colores*—which, through the simulation of emotion, are being experienced by the declaimers and their audience—that the multiple shifting of moral perspective is enabled. This affectively-laden multiple shifting of moral perspective, in turn, generates norms and values that may be possibly relevant to applying

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<sup>20</sup> Bonner, *supra* note 2, at 56.

and interpreting the laws in question.

## II. Hypothetical Narratives in Common Law Reasoning

The declamations were, of course, exercises, and they may seem to be far removed from the practice of law. I want to suggest, however, that we can see something similar at work in the common law tradition, and in particular in how common law judges and advocates employ hypothetical narratives. My example will be a contemporary one: the case of *White & Carter v. McGregor* (1961),<sup>21</sup> in which the employment of hypotheticals played not only a vital role in the case, but also arguably in the future development of the relevant area of the law. Of course, I am aware of the dangers of presenting a single case as evidence of a broader practice—and I happily acknowledge that future work will need to be done to test this idea.<sup>22</sup> My aim here is to give a sense of how it may work. My focus, throughout, as with the declamations, is on how the construction of hypothetical narratives, and the exchange of variations of them, involves the simulation of emotion and multiple shifts of moral perspective, and how this in turn generates potential justificatory resources (potentially relevant norms and values) that may be used in the instant case or in subsequent cases.

Employing hypothetical narratives has multiple dimensions. The first and most obvious of these is the very construction and invention of a hypothetical narrative (a fictional scenario, not involving the parties in the case but other fictional characters). Such an invention (which can be thought of as a form of coloring) is often designed (for instance by an advocate in a case) to appeal to the emotions of the audience (in particular, the judge(s)),

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<sup>21</sup> [1961] 3 All E.R. 1178.

<sup>22</sup> It may also be the case that the practice is culturally-relative, with judges in the English tradition employing more hypothetical narratives in the course of their judgments than, say, judges in the United States (my thanks to Simon Stern for this point). A promising study would inquire into the comparative history of uses of hypothetical narratives and ask in which legal traditions and in which periods of legal development, and why, are there variations in the popularity and sophistication of hypothetical narratives.



and to shift their moral perspective.<sup>23</sup> Hypothetical narratives, somewhat like declamatory *themata*, often push to certain extremes, even if not of implausibility, then at least to the outer limits of plausibility. The hypothetical narrative invites the judge(s) to simulate emotion both of what the characters in the hypothetical narrative might feel in those circumstances, and also how they (as judges) ought to feel in response to those emotions. The advocate then hopes that the judge(s) will see an analogy between the hypothetical narrative and the facts of the present case. Thus, if the judge is sympathetic to the character in the hypothetical narrative, it is hoped, they will also feel sympathetic to the relevant party in the case. We might think of this as a kind of color-by-analogy-with-a-hypothetical-narrative. The hypothetical narrative portrays the motivations and intentions of the characters in particular ways—these being ways that then affect the audience’s moral perspective of those characters and their actions. They then—ideally, from the perspective of the person proposing the hypothetical narrative—project the same simulated emotions and moral perspective onto the parties in the instant case.

The employment of hypothetical narratives, however, does not simply involve the construction of hypothetical narratives and then their analogical use. There are, in fact, a variety of possible reactions to such an initial introduction of a hypothetical narrative. For instance, a counter-hypothetical narrative may be constructed, and one that invites the simulation of emotion and the taking of a moral perspective that is quite the opposite of the initially proposed hypothetical narrative. Or, it may involve the amplification of the initially proposed hypothetical narrative—to push the initial simulation of emotion and moral

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<sup>23</sup> The study of the use of hypothetical narratives is one way in which we can encourage more overlap between the analysis of judging and the analysis of advocacy. For example, a further extension of this project could involve analysing the interactive banter of judges and advocates in oral hearings—this being a genre of dialogue that often involves the use of hypothetical narratives and that, in addition, often has a comic dimension. There may well be an echo of the Ancient rhetorical school in the interactive banter of contemporary common law courtrooms. In general, the comedy of argument (whether by advocates or judges) deserves further literary analysis.

perspective-taking even further. Or, it may involve the introduction of some other variation to the hypothetical narrative, the result of which may be uncertain (there can be genuine, non-strategic experimentation to the exploration of hypothetical narratives, of course principally by the judges). Or, finally, it may involve rejecting the analogy between the hypothetical narrative and the facts of the present case, thereby distinguishing the hypothetical narrative from those facts.

In all these various things that may be done with hypothetical narratives, emotions are simulated, moral perspectives are shifted, and, as a result, possibly relevant norms and values are generated. Again, as with the declamations, the quality of the process of generating these possibly relevant norms and values is enhanced by multiple shifts of moral perspective. It can sometimes be the case that a particularly powerful hypothetical narrative is offered, and this so affects the judges, who see a perfect analogy between the hypothetical narrative and the facts of the instant case, that no other tasks are performed, i.e. no counter-hypothetical narratives are offered and no attempt is made to distinguish it from the facts of the instant case. Insofar as that is so, the quality of reasoning itself suffers, and thus part of the argument of this essay is that judges should be careful when first confronted with a hypothetical narrative, and be prepared to play with it—again, to engage in the process of exploring versions of it, or offering counters to it, or seeing if they can distinguish it.

Only so much of this process can be explained in the abstract, and so I now proceed to illustrate both the dangers and possible benefits of the use of hypothetical narratives in a specific case.

In 1961, the House of Lords decided a case in which a hypothetical narrative played a crucial role. We could, somewhat cheekily, re-state the law, the issue and the facts in this case in the form of a declamatory *thema*:

*A party faced with a repudiation can decide whether to accept it and sue for damages,*

*or to continue with the contract and claim the full sum owed under it.* The sales representative of a garage business contracted with a local advertiser to advertise their business on Council bins for a period of three years. Later that same day, and many months before any advertising was due to begin, the owner of the garage business phoned the advertiser and said they did not want to continue with that contract. The advertiser refused to accept this repudiation, and instead continued with the contract, advertising the garage business on Council bins for three years. Having done so, the advertiser now claims the full amount due under the contract.

There were speeches both for and against the advertiser's claim. In the end, there were three in favor of the advertiser (Lords Reid, Tucker and Hudson, with Lord Reid giving the lead judgment), and two in favor of the garage business (Lords Morton and Keith). Having lost in all the lower courts, the advertiser won in the House of Lords.

Lord Reid was, at first, unequivocal in his assertion of the general rule:

The general rule is not in doubt: if one party to a contract repudiates it in the sense of making it clear to the other party that he refuses or will refuse to carry out his part of the contract, the other party, the innocent party, has an option. He may accept the repudiation and sue for damages for breach of contract whether or not the time for performance has come; or he may if he chooses disregard or refuse to accept it and the contract remains in full effect. (1181)

There was, nevertheless, also a well-known limit to the rule—an exception. Where the innocent party must, in wishing to continue with the contract, rely on the co-operation of the repudiating party, then the court will not force the parties to co-operate, and thus the innocent party will be compelled to accept the repudiation and sue for damages. This exception, however, did not apply to the present case: the advertiser did not need the garage business to do anything; they could (as they in fact did) simply begin and continue advertising (it is

useful to know that the parties already had a contract for 3 years immediately preceding this one). One might think this to be the end of the matter. It was, however, not so, for the advocate for the garage business argued that it was against the public interest to allow the advertiser to choose to refuse the repudiation and continue with the contract. As Lord Reid reported the argument, it contained the following hypothetical narrative:

A company might engage an expert to go abroad and prepare an elaborate report and then repudiate the contract before anything was done. To allow such an expert then to waste thousands of pounds in preparing a report cannot be right if a much smaller sum of damages would give him full compensation or his loss. It would merely enable the expert to extort a settlement giving him far more than reasonable compensation.  
(1182)

We could, again cheekily, re-phrase this hypothetical narrative as a *thema*:

*A party faced with a repudiation can decide whether to accept it and sue for damages, or to continue with the contract and claim the full sum owed under it. A company engages an expert to go abroad and prepare an elaborate report. Before the expert goes abroad, the company repudiates the contract. The expert refuses to accept the repudiation, goes abroad, and prepares the elaborate report. Having now returned, the expert claims the full amount due.*

Here, we see the first dimension of the practice of employing hypothetical narratives: a hypothetical narrative is constructed and introduced. The judges are invited first, to simulate the emotions of the characters in the hypothetical narrative as well as their own responses to those emotions; and, second, to see similarities between the hypothetical narrative and the facts of the present case. This is a kind of color-by-analogy-with-a-hypothetical-narrative. The judges are invited to experience the act of the character in the hypothetical narrative—here, the expert—as motivated by (for instance) wastefulness, or possibly by an intention to

exploit the vulnerability of the company (even if such a vulnerability is created, in part, by their own wish to cancel a prior agreement). In doing so, the judges are simulating not only the emotions of the characters in the hypothetical narrative (for instance, the indignation possibly felt by the company faced with such a stubborn expert), but also their own emotions in response to those emotions—e.g., anger directed at the expert. In simulating these emotions, the judges are also taking up a moral perspective: they are evaluating the character and their actions negatively. Once this initial simulation of emotion and moral perspective-taking is achieved, the advocate is hoping the judges will go on to see similarities between the hypothetical narrative and the facts of the instant case: here, similarities between the actions of the expert and the actions of the advertiser. Like the expert, the judge might think, the advertiser is being wasteful, and may be seeking to exploit the vulnerability of the garage business (non-innocent as they are). This process is by no means mere entertainment or even mere persuasion: it involves the generation of a potentially relevant norm or value, i.e. the motivation or intention to waste resources and / or to exploit the vulnerability of another. In simulating the emotion, and in taking up a moral perspective, the judges are being invited to consider whether another exception to the general rule ought to be introduced, and thus the freedom of the party faced with a repudiation further curtailed.

As noted above, however, constructing and introducing hypothetical narratives is but one dimension of employing them. A judge may respond to such a hypothetical narrative in any number of ways. One such way is to reject the analogy between the hypothetical narrative and the facts of the instant case, and thus distinguish it. Another might be not only to accept the analogy, but seek to strengthen the simulation of emotion and moral perspective-taking in the original hypothetical narrative by amplifying it further. Both of these possible replies are present in this case. As we shall see, Lord Reid finds a way to distinguish the hypothetical narrative from the facts of the case, while Lords Morton and

Keith (the two dissenting judges) find it to be, as lawyers are wont to say, “on all fours” with the present case and go on to amplify the hypothetical narrative.

How does Lord Reid distinguish the hypothetical narrative from the facts of the present case? His Lordship said the following:

If I may revert to the example I gave of a company engaging an expert to write an elaborate report and then repudiating before anything was done, it might be that the company could show that the expert had no substantial or legitimate interest in carrying out the work rather than accepting damages: I would think that the *de minimis* principle would apply in determining whether his interest was substantial and that he might have a legitimate interest other than an immediate financial interest. But if the expert had no such interest then that might be regarded as a proper case for the exercise of the generable equitable jurisdiction of the court. But that is not this case.

(1183)

Recall that earlier, when first reporting the hypothetical narrative, Lord Reid had said (paraphrasing the argument of the advocate that introduced the hypothetical) that to allow the expert to refuse the repudiation would mean thousands of pounds would be ‘wasted’ and would ‘merely enable the expert to extort a settlement’, on terms much more favorable than any compensation otherwise due. Thus, as initially presented, and perhaps as it initially struck Lord Reid, the exercise of simulating emotion resulted in feeling sympathy with the company, and negatively evaluating the expert. However, in his later treatment of the hypothetical, as immediately above, Lord Reid introduces what we may think of as a *color*. This *color* is that the expert “might have a legitimate interest other than an immediate financial interest”; he might have a “substantial interest.” Lord Reid thus suggests a possible motivation or intention—his Lordship conjures up (as declaimers did) a motivation or intention that invite the audience to alter their simulation of emotion and shift moral

perspective, now no longer against but instead in favor of the expert. The audience now begin to see at least how it might be possible to feel sympathy for the expert and how it might be possible to see the expert's act (to go abroad and do the report) in a different light. What if, for instance, (to offer a more specific *color*), the report concerns human rights violations in a foreign country with which the company is considering trading? Would it not be small-minded, and cheap or cowardly, for the company to suddenly decide to forego this important (and importantly elaborate) report?

This invention of *color* is no mere fun and games (although the pleasure of the play here is important, and is part of what triggers the simulation of emotion). In introducing this *color*, Lord Reid also generates a potential justificatory resource—a new potential exception to the general rule. A future court could—as indeed future courts did—say that although the general rule is that the innocent party has freedom to either accept or refuse the repudiation, that freedom is curtailed not only when continuing the contract would require co-operation from the repudiating party, but also where the innocent party has no legitimate interest (other than a mere financial interest) to continue the contract.

Lord Reid's treatment of the hypothetical narrative—if you like, his declamatory response to the *thema* of the hypothetical narrative—and, at once, his generation of a potential new exception to the general rule, is in *obiter*. It is not strictly speaking necessary to deciding the case. It is so because His Lordship finds a way of distinguishing the hypothetical narrative from the facts of the present case:

Here the respondent [the garage business] did not set out to prove that the appellants [the advertisers] had no legitimate interest in completing the contract and claiming the contract price rather than claiming damages, there is nothing in the findings of fact to support such a case, and it seems improbable that any such case could have been proved. (1183)

Thus, even if legitimate interest had been part of the recognized law—a recognized exception to the general rule—it would not have made a difference in this case. Even though it is articulated only in *obiter*, Lord Reid’s dictum went on to exercise considerable influence over future courts, i.e. it was picked up by future advocates and judges, and deployed (as ‘the legitimate interest’ test) as a further exception to the general principle (of the freedom of the innocent party to refuse or accept a repudiation).<sup>24</sup> What begins life, then, as a variation of a hypothetical narrative—as a kind of *color* that distinguishes the hypothetical from the facts of the present case—ends up (though not necessarily: it is a *potential* justificatory resource) as a new exception to a rule. This, it seems, is how, at least sometimes, the wheels of the common law move: through the simulation of emotion and its alteration, and the shifting between moral perspectives.

Let us return to the case. As noted above, where Lord Reid introduces a *color* that makes it possible to alter the initial simulation of emotion and take on a different moral perspective, the two dissenting judges, Lords Morton and Keith, instead amplify the hypothetical narrative, and thus enhance the original simulation of emotion and, at once, strengthen the original moral perspective it invited. Consider the following passages from the judgment of Lord Keith:

I find the argument advanced for the appellants [the advertisers] a somewhat startling one. If it is right it would seem that a man who has contracted to go to Hong Kong at his own expense and make a report, in return for a remuneration of £10,000, and who, before the date fixed for the start of the journey and perhaps before he has incurred any expense, is informed by the other contracting party that he has cancelled or repudiates the contract, is entitled to set off for Hong Kong and produce his report in

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<sup>24</sup> For a recent discussion of Lord Reid’s legitimate interest test, including subsequent cases, see Janet O’Sullivan, Repudiation: Keeping the Contract Alive, in *Commercial Remedies: Resolving Controversies* 51 (Graham Virgo and Sarah Worthington eds., 2017).



order to claim in debt the stipulated sum. Such a result is not, in my opinion, in accordance with principle or authority and cuts across the rule that where one party is in breach of contract the other must take steps to minimise the loss sustained by the breach (1190)

Under the guise of these extra facts—the expert now going to Hong Kong, and his remuneration now reported as £10,000 (a tidy sum in 1961—as it still is now, at least for an academic!)—the act of the expert becomes even less intelligible and praiseworthy. The audience is invited to experience the expert’s act as flippant or especially unconcerned with the wastage of resources; after all, why insist on flying all the way to Hong Kong (presumably from London—again, in 1961 a longer journey than it is today) when this is against the express wishes of the company that hired one? The facts of the hypothetical narrative are amplified: the audience is invited to move even further (than they arguably already did when the advocate introduced the original hypothetical narrative) towards negatively evaluating the expert’s act—and, by a now strengthened analogy, the act of the advertiser in the case (the *strengthening* of the analogy assumes, of course, that one is already inclined to think that the advertiser was wasting costs). Here, further ammunition is provided in favor of the potential justificatory resource introduced by the original hypothetical narrative, namely that the freedom of the innocent party is to be curtailed when it would result in a large wastage of resources. As persuasive as such an amplification can be, it can also have its costs. For instance, in being amplified in this way, some of the subtlety of the original hypothetical narrative is lost, for the other possible exception, namely where the repudiating party’s vulnerability may be being exploited, has dropped out of view. One could also argue, in this specific case, that Lord Reid’s potential justificatory resource is somewhat more principled than that of Lords Keith and Morton, for the latter seems to require an economic judgment (hence, perhaps, the amplification of the facts and the mention of a

specific sum), whereas the former is more moral than economic (it requires, to allow the refusal of the repudiation, the identification of some legitimate interest over and above a mere financial interest).

So far, however, we have seen three ways of employing hypothetical narratives: first, the construction and introduction of a hypothetical narrative and the proposed analogy between it and the facts of the instant case; second, the varying of a hypothetical narrative and, in the process, the distinguishing of the hypothetical narrative from the facts of the instant case; and third, the amplification of a hypothetical narrative. How about, however, the construction and invention of an alternative or counter-hypothetical narrative? Could that have improved the quality of the legal reasoning in this case?

Consider that Lord Reid's purported exception still only relates to the perspective of the innocent party—if they have a legitimate interest, the law should allow them to continue. But what if the *repudiating* party has a legitimate interest—over and above merely trying to get out of a bad deal and save some money—in not having the contract continue? One can imagine an alternative hypothetical narrative—if you forgive, another *thema*:

*A party faced with a repudiation can decide whether to accept it and sue for damages, or to continue with the contract and claim the full sum owed under it.* A famous politician contracts with a painter to paint his portrait. After the contract is finalised, but some time before the painting is due to be painted, the politician discovers that the painter has just joined a far-right wing party. The politician calls the painter to cancel the contract. The painter refuses and, relying on the many photographs available of the politician, the painter paints the painting. Having done so, the painter now claims the full sum under the contract.

Put this way, what might emerge into view is the normative insight that it may be relevant, in reflecting on the limits of the freedom to refuse a repudiation, to consider the interests of the

repudiating party (in the above hypothetical narrative, reputational interests—not being harmed by being painted by a disreputable painter). A new potential justificatory resource emerges here: a further exception to the limits on the freedom to refuse a repudiation where (say) continuing with the contract would harm the interests of the repudiating party over and above their immediate financial interests. The normative insight here is generated not by amplifying or distinguishing an existing hypothetical narrative, but introducing another one, somewhere in the vicinity of the original one but not covering the exact same ground.<sup>25</sup> Thus, if we are to take seriously the practice of employing hypothetical narratives as not only a mode of persuasion, but also a mode of inquiry (into what norms and values may be at stake in some area of the law), we do well to generate more hypotheticals, including alternative and counter hypothetical narratives to those already proposed. Of course, there will be a practical limit to how much this can be done by advocates and judges in a case—but it is certainly an activity that can be engaged in by scholars, in dialogue with judges and advocates.

### III. Conclusion

In this essay, I have looked at the Ancient Roman art of declaiming, and especially the introduction of *colores* in the *controversiae*, and sought to show how this involved a process

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<sup>25</sup> One might have presented this not in the form of a hypothetical narrative, but as a *color* to the facts of the present case, e.g. one can imagine a declaimer introducing facts about how perceptions of the community have changed such that anyone advertising on Council bins is regarded as cheap or dirty, and that such advertising hurts the business more than it helps it. In those circumstances, would we not simulate different emotions, and see the act of the advertisers in a different moral light – as, in fact, an act of bad faith, intentionally doing harm to the garage business? This is possible, but I would argue that there is a cognitive advantage to presenting this in the form of a hypothetical narrative rather than a *color* introduced in the facts of the present case: there is a freedom that one experiences in the context of processing hypothetical narratives that one does not when confined to the facts of the present case, and this freedom can help in the simulation of emotion, which is so crucial to the shifting of a moral perspective.

of affectively-laden moral perspective shifting.<sup>26</sup> The genre of the declamatory *themata* helped trigger the simulation of emotion, and the intensively interactive process of inventing and exchanging variations of *colores* helped to do this multiple times. This multiplicity assisted in generating norms and values that might be relevant to the meaning and scope of the relevant laws in question, or to adjudicating conflicts between laws. The essay then proposed that something similar—though of course not quite the same—was at work in the employment of hypothetical narratives in common law reasoning. Here, the form of hypothetical narratives also often helped trigger the simulation of emotion and the taking up of a moral perspective. Where the judges were impressed with the initial hypothetical narrative, they sometimes saw an analogy between it and the facts of the present case, and the hypothetical narrative went on to play a crucial role in deciding the case in a certain way. However, judges can also react to the initial proposal of a hypothetical narrative, and its analogy to the facts of the instant case, in other ways: for instance, by introducing a variation to the hypothetical narrative and drawing on that variation to distinguish the hypothetical narrative from the facts of the instant case. In both instances, the simulation of emotion and moral perspective-taking and shifting can generate potential justificatory resources. Judges and advocates, and perhaps also scholars, can also go further, offering more either alternative or counter-hypothetical narratives, and thereby generating more possibly relevant norms and values. It turns out, in short, that simulating emotion may be one of our best ways of reasoning about matters of value.

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<sup>26</sup> Future work might relate this affectively-laden multiple shifting of moral perspective to the cognitive work we engage in, both in everyday life and in the reading of fiction, when projecting what Lisa Zunshine has called “nested mental states.” Fittingly, in the context of the present essay, Zunshine has also argued that “[e]motions play a crucial role in nesting.” Lisa Zunshine, *From the Social to the Literary*, in *The Oxford Handbook of Cognitive Literary Studies* 176, 176 (Lisa Zunshine ed., 2015). My thanks to Simon Stern for this point.